United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-7468

To be argued by
RICHARD A. HOLMAN

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

P/S

H. C. WAINWRIGHT & Co.,

Plaintiff-Appellee,

against

WALL STREET TRANSCRIPT CORPORATION and
RICHARD A. HOLMAN,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF OF DEFENDANT-APPELLANT RICHARD A. HOLMAN

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Defendant-Appellant
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I

Neither the copyright clause nor the First Amendment to the Constitution contemplates or permits restraints on the truthful, direct reporting of news of public interest.

The Transcript and Holman have dealt with the precise issue involved in this case—truthful reporting of newsworthy material of public interest direct from the source. When the framers of the Constitution wrote that Congress shall have power "To promote the Progress of Science and Useful Arts" (Art. I, Sec. 8) they did not intend to nor

did they give Congress the power to curb truthful news reports on newsworthy material direct from the source.

This is clear not only from the history of the copyright clause (see Holman Br. pp. 27, 28) but also from the fact that since the trial of John Peter Zenger in 1735, the thought of restricting the truthful reporting of news was anathema for the members of the constitutional convention. Moreover, the almost simultaneous adoption of the First Amendment, with its outright ban of restraints on the truthful reporting of news direct from the source (see Holman Br. pp. 13-17) compels the conclusion that the copyright clause of the Constitution was not intended to apply to the news reporting involved in this case.

Thus there is no conflict between the First Amendment and the copyright statute, which must be construed to put no constraints whatsoever on the truthful reporting of news of public interest direct from the source. If there were any conflict, the First Amendment must obviously prevail over any statute adopted by Congress including the copyright laws.

Since it was never intended that the copyright clause in the Constitution should restrict truthful news reporting direct from the news source we have a threshold issue that Wainwright utterly fails to meet.

Four pillars of the defense remain undisputed.

1. The copyright clause in the Constitution was not intended to and does not restrict the right of newspapers or the media to report truthfully news of public interest direct from the source.

2. The First Amendment to the Constitution forbids restraints on the truthful reporting on newsworthy material of public interest direct from the source as in this case whether by copyright statute or any other statute.

3. Brokers reports such as the Wainwright reports in this case are important news.
4. Transcript's reports were truthful and direct.

Unable to meet the simple issue here, Wainwright attempts to confuse the issues by grossly misstating the position of the Transcript and Holman. To provide a few examples of Wainwright's distortions: "The Transcript argues that their status as a newspaper immunizes them from the copyright laws." (Wainwright Br. p. 32). Another example of plain misrepresentation to the Court: "The Transcript's assertion that its status as a newspaper makes impermissible any injunctions against it under the Copyright Act . . ." (Wainwright Br. p. 36)

Transcript and Holman make no such assertions or claims. What we do assert in this case is the untrammeled right to report truthfully the news herein to the public direct from the source, the Wainwright report. Neither Transcript nor Holman claims the right to use copyrighted pictorial illustrations of styles in women's apparel in advertising as in *L. A. Westermann Co. v. Dispatch Printing Co.,* 249 U.S. 100 (1900) (Wainwright Br. p. 36). Nor do we claim the right to pirate The Wall Street Journal version of a Wainwright report, or anyone else's version of a Wainwright report, or anyone else's version of a speech by President Carter or anyone else's version of a government report. We do say that the Wainwright report or the Carter speech or the government report is the news story and we can report on it directly. What these people say, right or wrong, is important. (See Point III *infra,* p. 5).

There is no doubt that newspapers are subject to a great many laws and newspapers may infringe the copyright laws in many ways; but a newspaper cannot and does not infringe the copyright statute or any other statute when, as here, it truthfully reports news of public interest direct from the source.

II

Public Policy Mandates the Availability of This News

This case demonstrates the wisdom of the founding fathers in providing the right of the press to report truthfully important news direct from the source to the public. A free press maintains public confidence in the integrity and fairness of our political, economic and social system. Nothing can be more destructive of public confidence than prohibiting a free press from truthfully and directly reporting news to the public.

It would have a devastating impact on public confidence in the nation's financial markets to bar the financial press from publishing news accounts of studies by important brokers that could affect the course of trading in securities. The ultimate effect of such legal action would be destructive for both brokers and institutional customers as well as the nation's capital markets and economy.

Wainwright is unable to challenge this position which is documented by the Treasury Department study entitled *"Public Policy for American Capital Markets"* and issued in February, 1974. The study declares: "Public policy must strive to create conditions which result in the equitable treatment of individual investors as compared with institutional investors."

The individual investor's confidence in the financial marketplace has been waning, because of his feeling that large institutional investors have access to information that is denied to him.

Only through full reporting of important statements by major brokers can the ordinary small investors get any semblance of the massive news available to the big institutions. This news can cause tidal waves in the financial sea. Only through a restoration of public confidence in the marketplace can brokers like Wainwright hope to prosper. Wainwright is the only broker to ask a court to

censor and enjoin the news reporting involved in this case. No other broker has sought Court action to prevent the transcript or any other newspaper from reporting this news to the public (191a).

Transcript and Holman have focused their briefs on the principal issue involved in this case—truthful, direct reporting of important news. Wainwright, on the other hand, has dealt with just about everything related to copyright and the First Amendment *except* this simple, precise issue.

III

Brokers Reports Are Important News Which the Public Has a Right to Know

Wainwright all but concedes this point. Since the authorities are unanimous on this point (Holman Brief pp. 17-20) plaintiff was unable to cite a single authority to the contrary. What Wainwright does do is baldly attempt to confuse the issue with respect to an item which appeared in The Wall Street Journal of November 27, 1972, page 33. Wainwright claims that this article shows that the original analytical contents, the style, impressions, estimates, assessments and appraisals of brokers reports are not news (Wainwright Br. p. 24). Precisely to the contrary, this article shows that all of these are essential elements of the news story on a broker's report, as demonstrated by this story in The Wall Street Journal, which we quote in full:

"Heard on the Street
By Dan Dorfman

"It was a 'nightmare' for Oppenheimer & Co., or so, at least, one inside source describes it.

"It was also an equally bad dream—and a pretty costly one at that—for stockholders of hospital management companies. Many watched with dismay last week as shares of such fast-growing concerns as Hospital Corporation of

America and American Medical International were clipped for hefty losses amid widespread rumors that Oppenheimer was about to come out with an extremely negative appraisal of the industry.

"But not everybody seems to have suffered. One well-placed source says a few 'informed people' had capitalized on the situation by selling short or selling borrowed shares, notably stock of American Medical. In a little over a week's time, that stock plunged nearly 20% in value, sparked by a one-day drop last Tuesday of 5⅞ on a brick turnover of 52,100 shares. It's understood there has since been some short covering, or replacement of borrowed shares, on American Medical's stock. In the same period, Hospital Corp. plummeted about 22%.

"The entire affair started about three weeks ago at a private meeting of Oppenheimer analysts. Analyst Martin Schwartz presented a draft that was highly negative on longer-term trends of the hospital management industry. As usually happens, secrets don't remain secrets very long in Wall Street. Word got out. And, according to reports, a copy of the study found its way into other brokerage concerns—prior to any formal disclosure to Oppenheimer clients.

"Some irate Oppenheimer clients called up their contacts at the brokerage concern to complain bitterly about being left in the dark. Meantime, the stocks were battered by brisk selling. To aggravate the situation, Harper's magazine hit the newsstands with a critical article on the hospital management industry.

"As things currently stand, the leak on the report has led Oppenheimer to step up its issuance date. It's expected within the next few weeks. However, a synopsis has just been sent to clients.

"Leo Mandrakos, Oppenheimer's partner in charge of institutional research, declines to discuss the situation. However, the new report, according to an informed source,

will be, as he puts it 'much more balanced than the draft.' The draft mentioned Hospital Corp. and cited the possibility of price-earnings multiples of 10 to 20 being accorded the industry in the event of any earnings slow-down. Both these points will be eliminated from the report. In fact, no company will be mentioned.

"Using 15 as a mid-point multiple, both Hospital Corp. and American Medical, each of which sells at over 20 times Wall Street's projected 1973 net, would be susceptible to further declines of more than 30% from current price levels, based on the original Oppenheimer assessment.

"The Oppenheimer study going to clients won't make any sale recommendations. Its intent, according to one source, will be to alert institutions to potential longer-term problems. It will stress it expects the industry to maintain its historical growth rate in earnings of 15% to 20% for the rest of 1972 and all of 1973. But it will warn that any change in future earnings expectations could cause a downward revision of the previous 20 to 35 multiple evaluations.

"Here is what reportedly bothers Oppenheimer:

—The government share of health care funding is increasing and this will bring the industry under a higher level of regulation.

—Acquisitions have been a significant growth ingredient. But this is likely to be a less viable earnings increment as the remaining number of desirable hospitals to acquire has dropped considerably.

—With acquisition fever likely to diminish, the industry's future growth will be largely based on the ability to build new hospitals. However, if multiples come down, financing of new projects could become considerably more costly.

—The Price Commission currently permits only a 6% annual rate in hospital charges to patients. Previously, such charges were climbing 14% a year.

—In patient days (the number of days spent in hospitals) are declining, reflecting greater use of out-patient facilities, a declining birth rate and a more cost-conscious government. They add up to a lower occupancy rate.

—There's a question about accounting—whether it's 'conservative or optimistic.' Blue Cross, Medicare and Medicaid charges are only estimates of receivables. But actual reimbursement is based on audit and that's frequently years behind: thus, you're uncertain about the validity of the reporting revenues, 'which, at best, are only estimates'.

"It's understood that Oppenheimer also views as a potential headache for the industry recent passage of the Social Security amendment, which could lead to greater government tightening of existing health programs and higher standards, resulting in increased costs. It also thinks hospital management companies have largely reaped the benefits of the higher profit margin business from ancillary facilities.

"The major question of course, is: What now for hospital management stocks? With the securities way down from their highs, there's the obvious attraction of buying what some might term 'a bargain.' And both Hospital Corp. and American Medical see continued growth.

"But at least one savvy Big Board floor trader, without any involvement in the stocks, contends a 'hands off' approach is called for. Says this source: 'I think these are down stocks. What Oppenheimer has done is to seriously question the future earnings power of the industry. Who knows if they're right or wrong? But if they're right, the game is over for these stocks . . . and the problem is you're going to have to wait for the answer. You don't put big money into uncertainty. That's not what institutional investment is all about.' "

Wainwright reports have been the subject of news stories in The Wall Street Journal and these news account include

the original analytical contents, the style, impressions, estimates, assessments and appraisals of the report.*

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* From The Wall Street Journal of August 22, 1975, page 25:

"'Earlier estimates of a full industry profit recovery in 1976 now seem too optimistic' says Daniel W. Starrett, of H. C. Wainwright & Co., 'and the horizon on such a development has probably been pushed into 1977.' His views were in a special report to clients that reviewed first half results of six major steel companies.

"Mr. Starrett sees uneven results flowing from recently announced price increases, which center on the 3.8% average increase set by U. S. Steel. The decision by U.S. Steel to delay price increases on sheet and strip products until Oct. 1, he says, suggests increased pressure on profits of most other steel companies in the current quarter.

"Although the analyst is basing his current estimates for the six companies on the assumption that the 3.8% price boost can be realized over the rest of this year, he terms it a 'shaky' assumption.

"'The profit outlook for the remainder of the year remains rather cloudy. With future pricing perhaps the greatest area of uncertainty,' he says.

"'Cost increases and sharply reduced operating rates will clearly require some relief if the industry's near-term profit viability is to be maintained. The extent to which pressure from cut-rate imports and reduced demand will limit or prevent improved price realization cannot be gauged with any confidence.'

"Mr. Starrett estimates that industry shipments this year will drop to 84 million tons.

"Although he believes industry volume could rebound 10% or more next year, he doesn't expect supplies to be tight. 'Although cost-price relationships will be the ultimate determinant, it seems unlikely at this early date that industry profits will return to peak 1974 levels next year,' he says.

"'In the interim,the odds appear to favor more bad news. In general, while quarterly dividend rates don't appear to be in jeopardy, the extra payments adopted by all but U. S. Steel in 1974 might be reduced or eliminated.'

"Mr. Starrett estimates that per-share earnings of the six major companies will fall from the year earlier by the following percentages to the third and fourth quarter, respectively: U. S. Steel, 56% and 42%; Bethlehem 60% and 63%; Armco 62% and 32%; Inland 66% and 13%; National 84% and 54%; and Republic 72% and 52%.

"Mr. Starrett's estimates of per-share net this year: U. S. Steel $8.50 vs. $11.52 in 1974; Bethlehem $5 vs. $7.85; Armco $4 vs. $6.71; Inland $5.50 vs. $7.96; National $3.50 vs. $9.44; and Republic $6 vs. $10.55. His U.S. Steel estimate includes 82 cents per share earned in the first quarter from sale of timberland."

In fact there was a news story on a Wainwright report in The Wall Street Journal of June 4, 1976, the same day set by Wainwright's attorneys as the deadline for the Transcript to cease news stories on Wainwright reports or face possible legal action. (29a.) June 4, 1976 was also the day Wainwright sent a notice to its clients that it would use the copyright laws to stop news accounts in the media on reports issued by Wainwright. On June 4, 1976 The Wall Street Journal had a news story on a Wainwright Report.*

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* From The Wall Street Journal June 4, 1976, page 29:

"Until this week, Charles A. Parker, Wainwright's economics analyst was among those forecasting a corporate profit gain of 25% this year. (Their estimate range as high as 33%.) But Mr. Parker's detailed examination of first quarter data, among other things, has led him to scale down his profit outlook and hold to a higher inflation number than most others.

"In a current report to Wainwright clients, Mr. Parker says that year-to-year profit gains of 45% pretax and 41.4% after taxes in the first quarter were 'disappointing' in light of higher-than-anticipated real growth in output. Profits should have risen 50%, he says, if the full year is to produce a 25% gain.

" 'The most recent data suggest to us that final demand is slowing,' he says, 'particularly retail sales. Inventories are accumulating much faster than anticipated and profit margins are coming under increasing pressures.'

"Mr. Parker says a 25% gain in 1976 corporate profits now appear unlikely, given his expectation of a slowing of output growth. He expects real GNP for the full year to be in line with the 6% consensus, but believes that in the fourth quarter real GNP growth will be 'at a rate less than the long-term potential growth rate of 4%' a year. Slower output growth will coincide with an increase in world-wide money expansion to produce a rising inflation rate, he believes.

" 'On a trend basis, profits could flatten out as early as the third quarter,' Mr. Parker says. 'Consequently, we now expect 1976 profits to exceed the 1975 figure by a more modest 20%. It's significant that with inflation real economic profits will grow only modestly.'

"Mr. Parker defines real economic profits as corporate profits after adjustment for inflation, inventory replacement and under-depreciation. Unpublished studies, he says, show that stock prices have anticipated changes in such real profits by up to a year. Although real profits are still well below peaks set in the mid-

(footnote continued on following page)

Even when brokers are quite wrong in their perceptions, their reports can have a significant and long-term impact on the market. In his book *A Random Walk Down Wall Street,* Burton G. Malkiel, professor of economics and director of the Financial Research Center at Princeton University, points out at page 171:

> "Brokerage firms specializing in research services to institutions wield enormous power in the market and can direct tremendous money flows in and out of stocks. Many speculators (and indeed even fund managers) will rush to buy and sell a stock simply because they believe a large firm is about to recommend some action on it. In this environment it is quite possible that erroneous beliefs about a stock by some professionals can for a considerable time be self-fulfilling".

The dramatic impact that reports by brokers such as Wainwright can have on the market is one of the reasons why it is important for newspapers such as The Wall Street Journal and The Wall Street Transcript to

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(*footnote continued from preceding page*)

1960s, they have nearly doubled from depressed levels reached in late 1974, he says, coincident with a sharp advance in the stock market.

"'When considered in combination with the recent behavior of stock prices, this raises obvious doubts about the profit picture during the remainder of 1976 and beyond,' he says. Mr. Parker says he is expecting the rate of inflation to be 'in excess of 7%' by year-end.

"Unless there is a major change in government policy to give industry more incentives to spur output, Mr. Parker believes output growth could continue to slow into 1977, with real GNP expansion easing to the 3% rate. Mr. Parker hasn't published a profit estimate based on that rate but a 3% growth would imply an improvement in profits next year well below the current consensus of 15% growth from the 1976 level.

"Mr. Parker says, however, that he believes a major policy change that would include tax cuts and other business incentives is probable and that this will lead to a high and durable rate of growth in the longer term."

vindicate the public's right to know by publishing news accounts of these reports. And this is precisely what many newspapers do (190a) and what Wainwright asks this Court to ban.

Wainwright's suggestion that newspapers such as the Wall Street Journal and The Wall Street Transcript are engaged in a form of "parasitism" (Wainwright Br. p. 21) is arrogant, presumptuous and incorrect. Wainwright's attitude of "the public be damned" is the sort of attitude that has helped cause the disastrous lack of public confidence in the fairness of the national capital marketplace. Since the Wainwright news story accounted for no more than one one-thousandth of the news content of an issue of the Transcript (233a) and not much more of the issue of The Wall Street Journal, it is stretching things at least a bit to suggest that the Wainwright news story increased the sale of either publication.

Since Wainwright's reports are so trivial in relation to the overall operations of the Transcript in reporting Wall Street news, it may reasonably be asked why the Transcript is making this appeal.

The answer is that we are not merely fighting for ourselves, but for the right of every newspaper to carry truthful reports of newsworthy material direct from the source. Wainwright's position, if upheld, would represent a major erosion of the First Amendment rights of this country's newspapers. No responsible newspaper could do anything but fight such erosion with all the strength at its command. Wainwright is trying to use the copyright law as a privacy statute, copyrighting reports so that the public will have no access to them. No newspaper could tolerate such abuse of the law.

Wainwright simply misrepresents the facts when it claims lack of knowledge that the Transcript described its "account" of a report by a broker such as Wainwright as "timely news" (Wainwright Br. p. 25). They were so

described by the Transcript in public advertisements that long antedated this lawsuit, and it was Wainwright, not the Transcript that made these advertisements part of the record here (162a, 1642). And of course the accounts in The Wall Street Transcript, The Wall Street Journal and myriad other newspapers are news stories.

Wainwright complains about the Transcript assertion that its news reporting will save readers hundreds of hours during the course of a year (Wainwright Br. p. 18).

We submit that every newspaper that's worth its salt saves its readers hundreds of hours of reading. A newspaper reports the highlights of newsworthy speeches in Congress, and this enables its readers to avoid a daily perusal of the *Congressional Record.* A newspaper reports on the activities of state and local legislative bodies, once again saving time for its readers.

What the Transcript advertised, therefore, was exactly what all first-class newspapers provide in their various areas of coverage.

To get news of the financial marketplace, government operations or anything else, members of the public, with limited time and resources, rely upon a free press. As Mr. Justice White pointed out in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), at page 491:

> "In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations."

This is also true in the financial marketplace especially with reference to Wainwright which seeks to prevent the public from finding out about its reports (236a). Wainwright suggests that its reports are offered for sale by Find/SVP and claims "The record does not, nor can it be made to . . ." show Wainwright restricts public access.

Even this limited record shows no public access (183a, 236a). When Wainwright refers to what the fuller record can be made to show it may be far less than candid with the Court. For example, a recent article in Business Week magazine, December 13, 1976, p. 67, points out that reports are put on sale through Find/SVP only months after they have been issued. There is not a shred of evidence showing when, how or at what price Wainwright reports are allegedly offered to the public for meaningful market use. They simply are not available. *The Wall Street Transcript,* on the other hand, is regularly available to the public on sale, through subscription and in hundreds of public libraries (223a). *Transcript* even advertised the availability in public libraries in large type in advertisements in Barrons (162a).

Many people and institutions who are the subject of news reporting complain about the press for one reason or another. As against these complaints, history has borne out the wisdom of having a press free to report news truthfully, directly and completely.

IV

The First Amendment Right to Report Truthfully and Directly on the News Has Not Been Repealed by the Fair Use Doctrine.

However one may feel about the "preferred position" of the Bill of Rights in general and the First Amendment in particular it is certainly clear that the truthful reporting of news direct from the source has the highest priority (see Holman Br. pp. 13-17, 20-25, 32).

The claim that the fair use doctrine has curtailed the First Amendment right to report news is totally unsupported and in square conflict with the import of the line of Supreme Court cases leading to *Nebraska Press Association v. Stuart,* 427 U.S. ——, 96 S.Ct. 2791 (1976).

The conclusion of the Court below that fair use has been "precisely contoured" (217a) to the First Amendment is inconsistent with the Court's conclusions that fair use is of "quicksilver content" with "varying and overlapping" definitions (219a).

First Amendment rights to report important news cannot depend on guesses as to how a Court might apply a doctrine as vague as fair use. To apply fair use would lead to that dangerous evil of self-censorship so recently condemned by this Court in reversing a libel judgment. *Hotchner* v. *Castillo-Puche* (2d Cir. No. 674/1976, March 23, 1977).

The necessity for an untrammeled right to report news is made obvious by the dilemma Wainwright poses. Wainwright claims that newspapers should not be free to quote from its reports, should not be free to paraphrase them and at the same time the newspaper should be liable for any "omissions from or inaccuracies in" its news reports (Wainwright Br. p. 32). As the Supreme Court suggested in *Time Incorporated* v. *Pape,* 401 U.S. 279 (1971), the best way for a newspaper to handle a report such as the Wainwright report is by ". . . full direct quotation of the words of the source, with all its qualifying language . . ." 401 U.S. 285.

V

Wainwright Is Guilty of Using Inside Information and This Precludes Relief Herein.

Wainwright's claim that the only support in the record for this argument is page 182a is so frivolous that it must be concluded Wainwright has no defense here. Page 182a was not even cited when the facts on this issue, *out of Wainwright's mouth,* were detailed (Holman Br. p. 30). These admissions bring this case squarely within *SEC* v. *Geon Industries,* 521 F. 2d 39 (2 Cir. 1976), a conclusion which even Wainwright finds inescapable.

CONCLUSION

The order appealed from should be reversed with costs.

Respectfully submitted,

RICHARD A. HOLMAN, *Pro Se*
Defendant-Appellant

(61299)

375—Affidavit of Service

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

~~NEW YORK SUPREME COURT APPELLATE DIVISION~~ ~~DEPARTMENT~~

United States Court of Appeals for the Second Circuit.

H. C. Wainwright & Co., Plaintiff-Appellee,

against

Wall Street Transcript Corp. and Richard A. Holman,

Def ndant-Appellants

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

Bernard S. Greenberg being duly sworn,

deposes and says that he is over the age of 21 years and resides at 162 East 7th Street, New York, N.Y.

That on the 31st day of March, 1977 at 80 Pine Street, New York, N.Y.

he served the annexed Reply Brief for Appellant Holman upon

Cahill, Gordon & Reindel

Attorneys for Plaintiff-Appellee

in this action, by delivering to and leaving with said attorneys two true copies thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the person mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 31st

day of March 1977

Roland W. Johnson

Bernard S. Greenberg

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1979

Service of two ~~three (3)~~ copies of

the within Reply Brief is

hereby admitted this 31st day

of March, 1977

Eaton, Van Winkle & Greenspoon

Attorney for Amalcort Wall Street Transcript